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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/542,732	07/20/2005	Yasuharu Ono	Q88728	2399

23373 7590 08/28/2008

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EXAMINER	
SCHLIENTZ, NATHAN W	

ART UNIT	PAPER NUMBER
1616	

MAIL DATE	DELIVERY MODE
08/28/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/542,732	ONO, YASUHARU	
	Examiner	Art Unit	
	Nathan W. Schlientz	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 March 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-19* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Status of Claims

Claims 16-19 were newly added in an amendment filed 28 March 2008. As a result, claims 1-19 are pending and thus are examined herein on the merits for patentability. No claim is allowed at this time.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 1, 2, 4-7, 9-12 and 14-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Koji et al. (JP 07-304620).

Koji et al. disclose an antimicrobial resin composition obtained by mixing at least one metal oxide, such as zinc oxide and titanium oxide, and a phosphoric acid quadrivalent metal salt-based antimicrobial agent represented by the following formula $Ag_aA_bM_2(PO_4)_3 \cdot nH_2O$, wherein A is an alkali metal, an alkaline metal, ammonium or hydrogen, M is a quadrivalent metal, $0 \leq n \geq 6$, with the proviso that (a)+(mb)=1 and m is valence of Al (Abstract). Koji et al. disclose examples of the quadrivalent metal salt-based antimicrobial agent with the following formulas ([0015]).

$$Ag_{0.005}Li_{0.995}Zr_2(PO_4)_3$$

$Ag_{0.01}(NH_4)_{0.99}Zr_2(PO_4)_3$

$Ag_{0.05}Na_{0.95}Zr_2(PO_4)_3$

$Ag_{0.2}K_{0.8}Ti_2(PO_4)_3$

$Ag_{0.1}H_{0.9}Zr_2(PO_4)_3$

$Ag_{0.5}Na_{0.25}H_{0.25}Zr_2(PO_4)_3$

$Ag_{0.9}Na_{0.1}Zr_2(PO_4)_3$

$Ag_{0.7}Na_{0.3}Sn_2(PO_4)_3$

Koji et al. further disclose that the titanium dioxide is preferably anatasu (i.e. anatase) or rutile with a particle diameter of 10 μm or less ([0010]), and that a calcium phosphate salt system antimicrobial agent had a particle diameter of 1.2 μm ([0037]). Koji et al. also disclose that the antimicrobial resin may be used in resin for fiber ([0026]). Also, Koji et al. disclose an example wherein 36 parts $Ag_{0.44}Na_{0.26}H_{0.30}Zr_2(PO_4)_3$ was mixed with 64 parts titanium dioxide ([0044]).

Response to Arguments

Applicant's Remarks filed 28 March 2008 have been fully considered but they are not found persuasive. Applicants argue on page 7 that Koji et al. discloses that the preferred average particle size of the metal oxide is equal to or less than 10 μm, but Koji et al. does not teach the maximum particle size to be less than 10 μm. However, the examiner respectfully argues that Koji et al. clearly discloses that the average particle size of the metal oxide is equal to *or less than* 10 μm, which encompasses a maximum particle size being substantially equal to or less than 10 μm.

Applicants also argue that the disclosure that calcium phosphate salt system of Koji et al. is not within the tetravalent metal phosphate-based antimicrobial agent of the present invention. However, Koji et al. disclose the calcium phosphate salt system as a comparison to the tetravalent metal phosphate, and they exemplify an embodiment wherein the average particle size of the calcium phosphate system is much less than 10 μm (i.e., 1.2 μm). Therefore, Koji et al. clearly envisaged the tetravalent metal phosphate particle sizes with a particle size much less than 10 μm.

Applicants further argue on page 7 that there is not disclosure of Koji et al. that the titanium dioxide in Example 4 is anatase, and Koji et al. discloses that both anatase and rutile are preferable, wherein rutile titanium dioxide has a Mohs hardness of more than 6. However, the examiner respectfully argues that since Koji et al. discloses that anatase and rutile titanium dioxide are the preferred forms, one of ordinary skill in the art would immediately envisage using anatase titanium dioxide in the Example 4. It is noted by the examiner that anatase titanium dioxide has a Mohs hardness of 5.5 to 6, as evidenced by Reade Advanced Materials.

Applicants also argue that the object of the present invention is different from that of Koji et al. However, the examiner respectfully argues that the instant claims are drawn to a composition with no mention of using said composition to solve the problem that an area of equipment that is in running contact with the molding is easily worn. Even though the claims are read in light of the specification, the use of a composition is not given patentable weight when the composition is disclosed by the prior art.

2. Claims 1, 5, 6, 10, 11 and 15-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Hideki et al. (JP 10-265314).

Hideki et al. disclose an antimicrobial agent composition obtained by including an antimicrobial powder represented by the formula $M1_aA_bM2_c(PO_4)_d \cdot nH_2O$ and a fluidity improving powder, such as alkaline earth metal salt powder, an amino acid-based modifier or an alkaline earth metallic salt of a higher fatty acid; wherein M1 is at least one ion selected from silver, zinc tin, mercury, lead, iron, cobalt, nickel, manganese, arsenic, antimony, bismuth, barium, cadmium and chromium with the valence of (l), A is at least one ion selected from an alkali metal, an alkaline metal, ammonium or hydrogen with a valence of (m), M2 is a tetravalent metal, $0 \leq n \geq 6$, (a) and (b) are each a positive number, (c) is 2 and (d) is 3 when (la)+(mb)=1 (Abstract), and is suitable for use in a fiber ([0001]). Hideki et al. further disclose that M1 is preferably silver because mildew-proofing, antibacterial properties, and seaweed-proofing nature can also be raised while it is excellent in safety ([0007]); A is preferably lithium ion, sodium ion, a hydrogen ion or ammonium ion ([0008]); and M2 is preferably zirconium and titanium ([0008]). Hideki et al. disclose several examples of the following formulas ([0009])

$Ag_{0.005}Li_{0.995}Zr_2(PO_4)_3$

$Ag_{0.01}(NH_4)_{0.99}Zr_2(PO_4)_3$

$Ag_{0.05}Na_{0.95}Zr_2(PO_4)_3$

$Ag_{0.2}K_{0.8}Ti_2(PO_4)_3$

$Ag_{0.005}Li_{0.505}H_{0.49}Zr_2(PO_4)_3 \cdot 1.1\ H_2O$

$Ag_{0.01}(NH_4)_{0.59}H_{0.4}Zr_2(PO_4)_3 \cdot 1.2\ H_2O$

$Ag_{0.05}H_{0.95}Zr_2(PO_4)_3 \cdot 1.5\ H_2O$

$Ag_{0.05}Na_{0.5}H_{0.45}Zr_2(PO_4)_3 \cdot 1.1\ H_2O$

$Ag_{0.05}Na_{0.6}K_{0.11}H_{0.24}Zr_2(PO_4)_3 \cdot 1.2\ H_2O$

$Ag_{0.05}Ca_{0.1}H_{0.75}Zr_2(PO_4)_3 \cdot 1.2\ H_2O$

$Ag_{0.1}Na_{0.5}H_{0.4}Zr_2(PO_4)_3 \cdot 1.1\ H_2O$

$Ag_{0.2}Na_{0.3}H_{0.5}Zr_2(PO_4)_3$

$Ag_{0.005}Li_{0.505}H_{0.49}Zr_2(PO_4)_3 \cdot 1.1\ H_2O$

$Ag_{0.01}(NH_4)_{0.59}H_{0.4}Zr_2(PO_4)_3 \cdot 1.2\ H_2O$

Hideki et al. also disclose that the fluidity improving powder includes calcium carbonate, magnesium carbonate, magnesium stearate, magnesium oleate, oleic acid calcium, alumina, aluminum hydroxide, potassium aluminum sulfate, MgO, calcium phosphate, talc, titanium oxide, colloidal silica, aluminum silicate hydrate, etc. ([0012]). Also, Hideki et al. disclose that the fluidity improving powder is present at 5 to 200 wt. parts to 100 wt. parts of antibacterial powder ([0012]). Furthermore, Hideki et al. disclose an example wherein the antimicrobial powder has a mean particle diameter of 0.9 μm or 1.3 μm, and the fluidity improving powder, calcium-carbonate powder, has a mean particle diameter of 9.7 μm ([0017] and [0018]).

Response to Arguments

Applicants argue on page 9 that Hideki et al. do not disclose the use of inorganic powders having Mohs hardness of 6 or less. However, the examiner respectfully argues that titanium oxide, which is synonymous with titanium dioxide and is disclosed by Hideki et al., has a Mohs hardness of 5.5 to 6, as evidenced by Reade Advanced

Materials. Also, it is commonly known in the art that titanium dioxide has three kinds of crystal structure: anatase, rutile and brookite. Therefore, one of ordinary skill in the art would immediately envisage using anatase titanium dioxide in the antimicrobial compositions of Hideki et al.

Applicants further argue on page 9 that Hideki et al. do not describe the antimicrobial powder and the inorganic powder having a maximum particle size of being substantially equal to or less than 10 μm, but rather teach a mean particle diameter for the antimicrobial powder of 0.9 or 1.3 μm, and a mean particle diameter of 9.7 μm for the inorganic powder, calcium carbonate. Applicants argue that there is a high probability that the calcium carbonate powder having a mean particle diameter of 9. μm has maximum particle size greater than 10 μm. The arguments of counsel cannot take the place of evidence in the record. In re Schulze, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). Examples of attorney statements which are not evidence and which must be supported by an appropriate affidavit or declaration include statements regarding unexpected results, commercial success, solution of a long-felt need, inoperability of the prior art, invention before the date of the reference, and allegations that the author(s) of the prior art derived the disclosed subject matter from the applicant. See MPEP 716.01(c)(II).

Applicants also argue that the object of the present invention is different from that of Hideki et al. However, the examiner respectfully argues that the instant claims are drawn to a composition with no mention of using said composition to solve the problem that an area of equipment that is in running contact with the molding is easily worn.

Even though the claims are read in light of the specification, the use of a composition is not given patentable weight when the composition is disclosed by the prior art.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in Graham v. John Deere Co., 383 U.S. 1,148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

1. Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Koji et al. (JP 07-304620) in view of Wells et al. (US 4,356,280).

Applicant claims:

Applicants claim an antimicrobial composition comprising a tetravalent metal phosphate-based antimicrobial particles represented by Formula (1), and inorganic compound particles wherein the size of both particles is substantially equal to or less than 10 μm, and the inorganic compound particles are smaller than the tetravalent metal phosphate-based antimicrobial particles.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Koji et al. teach an antimicrobial resin composition obtained by mixing at least one metal oxide, such as zinc oxide and titanium oxide, and a phosphoric acid quadrivalent metal salt-based antimicrobial agent represented by the formula $Ag_aA_bM_2(PO_4)_3 \cdot nH_2O$. Koji et al. further teach that the titanium dioxide is anatase form with an average particle diameter of 10 μm or less and the phosphoric acid quadrivalent metal salt-based antimicrobial agent particle size is preferably 1.2 μm; and that the resin is suitable for use in fibers, as discussed above.

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Koji et al. do not teach that the size of the anatase titanium dioxide is smaller than the size of the phosphoric acid quadrivalent metal salt-based antimicrobial agent. However, Wells et al. teach that titanium dioxide is a particularly preferred additive in spinning highly viscous synthetic polymer fibers used to decrease the luster of the resulting fiber spun from the molten polymer (col. 1, ll. 12-31). Wells et al. further teach that anatase titanium dioxide is the preferred form because it is softer than rutile, thereby giving lower abrasiveness in yarn processing equipment, and the preferred average diameter is 0.1 to 0.5 μm, most preferably 0.2 μm or less (col. 3, ll. 1-16).

Finding of *prima facie* obviousness

Rational and Motivation (MPEP 2142-43)

Therefore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to prepare an antimicrobial composition comprising anatase titanium oxide and a phosphoric acid quadrivalent metal salt-based antimicrobial agent represented by the formula $Ag_aA_bM_2(PO_4)_3 \cdot nH_2O$ with a particle size of 1.2 μm, as taught by Koji et al., wherein the particle size of the anatase titanium dioxide is preferably 0.2 μm or less, as reasonably taught by Wells et al. One of ordinary skill in the art would have been motivated to use anatase titanium dioxide with a particle size of 0.1 to 0.5 μm, most preferably 0.2 μm or less, because Wells et al. teach that anatase titanium dioxide with a particle size of 0.1 to 0.5 μm, most preferably 0.2 μm or less is preferably used in the production of fibers because it is softer than rutile, thereby giving lower abrasiveness in yarn processing equipment.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Response to Arguments

Applicants argue on page 12 that since Wells et al. do not disclose the composition comprising specific tetravalent metal phosphate and the composition comprising hard particles, one of ordinary skill in the art would not have been motivated to use anatase titanium dioxide having the particle size of 0.1 to 0.5 μm in order to improve the processability of a fiber or a film to which the antimicrobial composition is

added. However, the examiner respectfully directs attention to col. 1, ll. 26-31, wherein Wells et al. teach that titanium dioxide is used to decrease the luster of fiber. Therefore, one of ordinary skill in the art would have been motivated to use anatase titanium dioxide with the particle size taught by Wells et al., 0.1 to 0.5 μm, in the production of the fibers of Koji et al.

2. Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hideki et al. (JP 10-265314) in view of Wells et al. (US 4,356,280).

Applicant claims:

Applicants claim an antimicrobial composition comprising tetravalent metal phosphate-based antimicrobial particles represented by Formula (1) and inorganic compound particles, wherein both particle sizes are 0.1 to 5 μm, the inorganic compound particles are smaller than the tetravalent metal phosphate-based antimicrobial particles, and the inorganic compound particles are anatase titanium dioxide.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Hideki et al. teach an antimicrobial agent composition obtained by including an antimicrobial powder represented by the formula $M1_aA_bM2_c(PO_4)_d \cdot nH_2O$ and a fluidity improving powder, such as titanium dioxide, wherein the antimicrobial powder has a mean particle diameter of 0.9 μm or 1.3 μm, as discussed above.

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Hideki et al. do not teach that the titanium dioxide is anatase titanium dioxide and that the mean particle size of the titanium dioxide is less than the mean particle size of the antimicrobial powder. However, Wells et al. teach that titanium dioxide is a particularly preferred additive in spinning highly viscous synthetic polymer fibers used to decrease the luster of the resulting fiber spun from the molten polymer (col. 1, ll. 12-31). Wells et al. further teach that anatase titanium dioxide is the preferred form because it is softer than rutile, thereby giving lower abrasiveness in yarn processing equipment, and the preferred average diameter is 0.1 to 0.5 μm, most preferably 0.2 μm or less (col. 3, ll. 1-16).

Finding of *prima facie* obviousness

Rational and Motivation (MPEP 2142-43)

Therefore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to prepare an antimicrobial agent composition obtained by including an antimicrobial powder with a mean particle diameter of 0.9 μm or 1.3 μm represented by the formula $M1_aA_bM2_c(PO_4)_d \cdot nH_2O$ and a fluidity improving powder, such as titanium dioxide, as reasonably taught by Hideki et al., and use anatase titanium dioxide with an average particle size of 0.1 to 0.5 μm, most preferably 0.2 μm or less, as reasonably taught by Wells et al. One of ordinary skill in the art would have been motivated to use anatase titanium dioxide with a particle size of 0.1 to 0.5 μm, most preferably 0.2 μm or less, because Wells et al. teach that anatase titanium dioxide

with a particle size of 0.1 to 0.5 μm, most preferably 0.2 μm or less is preferably used in the production of fibers because it is softer than rutile, thereby giving lower abrasiveness in yarn processing equipment.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Response to Arguments

Applicants argue on page 12 that since Wells et al. do not disclose the composition comprising specific tetravalent metal phosphate and the composition comprising hard particles, one of ordinary skill in the art would not have been motivated to use anatase titanium dioxide having the particle size of 0.1 to 0.5 μm in order to improve the processability of a fiber or a film to which the antimicrobial composition is added. However, the examiner respectfully directs attention to col. 1, ll. 26-31, wherein Wells et al. teach that titanium dioxide is used to decrease the luster of fiber. Therefore, one of ordinary skill in the art would have been motivated to use anatase titanium dioxide with the particle size taught by Wells et al., 0.1 to 0.5 μm, in the production of the fibers of HIdeki et al.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Contact Information

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nathan W. Schlientz whose telephone number is 571-272-9924. The examiner can normally be reached on 8:30 AM to 5:00 PM, Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

NWS

/John Pak/
Primary Examiner, Art Unit 1616